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No. 04-623

IN THE

Supreme Court of the United States

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,

Petitioners,

v.

STATE OF OREGON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE NATIONAL ASSOCIATION OF PRO-LIFE NURSES IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE.....1

SUMMARY OF ARGUMENT.....1

ARGUMENT 2

I. A Key Factor In This Case Is The Attorney General's Deference, And Oregon's Lack of Same, To The Medical Profession's Own Understanding of What Constitutes "Professional Practice" and "Medical Purpose." 2

II. Determining What Constitutes Professional Medical Practice and Legitimate Purpose Best Lies, In the First Instance, With The Medical Profession, Not With Individual Practitioners Or With The State. 5

III. Oregon's Assisted Suicide Policy Negatively Intrudes Upon The Professional Ethics and Ethical Practice Of Nursing. 9

CONCLUSION 14

TABLE OF AUTHORITIES

CASES:

Oregon v. Ashcroft, 368 F.3d 1118 (9th Cir. 2004) 4

STATUTES:

21 U.S.C. § 801(1) 2
21 U.S.C. § 802(21) 2
Or. Rev. Stat. § 127.805(1). 1
Or. Rev. Stat. § 127.815. 3
Or. Rev. Stat. § 127.855(2). 4

OTHER AUTHORITIES:

American Nurses Association, Code of Ethics for Nurses with Interpretive Statements (2001) 10

American Nursing Association, Ethics & Human Rights Position Statements: Assisted Suicide (1994) 10

Asa Hutchinson, Administrator, Drug Enforcement Administration, Testimony before the House Comm. on Appropriations, Subcomm. On Commerce, Justice, State, and Judiciary (Dec. 11, 2001) 3

Brief of Amici Curiae Margaret P. Battin et al., Oregon v. Ashcroft, 368 F. 3d 1118 (9th Cir. 2004) (No. 0235587) 3

Carrie Farella, *Assisted Suicide: What Role for Nurses?*, NURSING SPECTRUM ONLINE (June 4, 2001) 9

Guidebook for Health Care Providers, Chap. 8 10

Oregon Nurses Association, ONA Provides Guidance on Nurses' Dilemma (1995) 12

Respondents Brief in Opposition to Petition for Writ of Certiorari filed by Peter A. Rasmussen, M.D. and David M. Hochhalter, RPh, Gonzales v. Oregon (U.S. 2005) (No. 04-623) 7

Sylvia R. Cruess et al., Analyses/Review of Literature: "Profession": A Working Definition for Medical Educators, 16 TEACHING & LEARNING IN MED. 74 (2004) 5

The Task Force to Improve the Care of Terminally-Ill Oregonians, The Oregon Death with Dignity Act: A Guidebook for Health Care Providers (2005) 9

INTEREST OF AMICUS CURIAE

The National Association of Pro-Life Nurses (NAPN) is an association of nurses with membership throughout the United States and in Oregon.[1] NAPN is dedicated to promoting respect for every human life from conception to natural death, and to affirming that the destruction of any human life, for whatever reason and by whatever means, fails to constitute good nursing practice. NAPN unites nurses who seek to excel in providing life-affirming care to all patients, including unborn and newborn children, persons with chronic disabilities, and individuals living with terminal conditions. The provision of a controlled substance "for the purpose of ending . . . life"[2] violates the ethical principles of the nursing and other medical professions. NAPN opposes any interpretation of the Controlled Substances Act that bars the Attorney General from deferring to the medical profession on the question of whether assisting suicide lies within the acceptable course of professional conduct and constitutes a legitimate medical use of controlled substances.

SUMMARY OF ARGUMENT

The Directive by the Attorney General at issue in this case defers appropriately to the widely shared and long-standing views of the medical profession. The State of Oregon's contrary policy conflicts with the medical profession's own understanding of what conduct falls within

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[1] Counsel for Petitioners and Respondents have consented to the filing of this amicus brief and their consents are filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part and the costs associated with producing and filing this brief were covered by the National Association of Pro-Life Nurses.

[2] Or. Rev. Stat. § 127.805(1).

the usual course of professional medical practice and what purposes qualify as legitimate medical goals. By prohibiting professional discipline for assisting suicides, Oregon law substitutes its own judgment for that of the medical profession. The Attorney General's deference comports with the Controlled Substances Act while Oregon's lack thereof, if incorporated into the federal law's statutory terms, turns the law on its head. Oregon's law also places medical professionals, including nurses, in an ethical bind. It forces them to abandon their professional duty to promote compliance by all members of the profession with medicine's fundamental norm of doing no harm. It also threatens nurses with undesirable degrees of involvement with suicide assistance decisions. This Court should overturn the Ninth Circuit's decision so that the Attorney General may continue to defer to the medical profession and enforce the Controlled Substances Act in a uniform manner that respects prevailing medical ethics.

ARGUMENT

I. A Key Factor In This Case Is The Attorney General's Deference, And Oregon's Lack of Same, To The Medical Profession's Own Understanding of What Constitutes "Professional Practice" and "Medical Purpose."

Congress did not define the textual references in the Controlled Substances Act (CSA) to "usual course of professional practice" or "useful and legitimate medical purpose."[3] The Attorney General defers generally to the medical profession when applying these phrases to the

[3] Controlled Substances Act, 21 U.S.C. §§ 802(21) & 801(1).

handling of federally controlled substances by federally registered medical professionals.[4]

By contrast, as the Attorney General and other amici will substantiate for this Court, the State of Oregon enforces a medical practice standard concerning patients with terminal conditions that diametrically opposes the medical profession's own consensus understanding about what constitutes the limits of professionally acceptable conduct.[5] The disparity between what Oregon authorizes and what the medical profession prohibits cannot be glossed over by referring to differences of opinion among physicians, academics and philosophers about the "ends of medicine."[6] The Attorney General is not called by the CSA to weigh and

[4] See, e.g., Asa Hutchinson, Administrator, Drug Enforcement Administration, Testimony before the House Comm. on Appropriations, Subcomm. On Commerce, Justice, State, and Judiciary (Dec. 11, 2001) ("Federal laws and regulations do not attempt to define or set standards as to what constitutes 'legitimate medical purpose' or 'the usual course of professional practice,' the requisite elements of lawful prescriptions under the CSA and DEA regulations. DEA relies upon the medical community to make these determinations.").

[5] Or. Rev. Stat. § 127.815 (authorizing physicians' assistance in the suicides of persons diagnosed as having less than six months to live).

[6] Thus, to quote from a source that disagrees with the position of your Amicus, even if "there is increasing support among medical professionals and writers in medical ethics" for medically-assisted suicide, the Attorney General must necessarily rely upon the determination of medicine's professional associations, such as the American Medical Association and the American Nurses Association, indicating that particular activities conducted by medical professionals have or have not "found a legitimate place in mainstream medical schools and wide acceptance in the everyday practice of medicine." Brief of Amici Curiae Margaret P. Battin et al. at 11, 14, Oregon v. Ashcroft, 368 F. 3d 1118 (9th Cir. 2004) (No. 0235587) (arguing that shifting understanding of the "ends of medicine" over time bolsters case for Oregon's DWDA).

contrast theoretical treatments of abstract generalities, but must determine what the medical profession itself, acting through its own professional associations and regulatory bodies, determines to be appropriate professional conduct.

Oregon's governmental interference with prevailing professional mores, accepted medical judgment, and ethics accountability is directly accomplished through the immunities section of the Oregon Death With Dignity Act (DWDA), which states in part: "No professional organization or association, or health care provider, may subject a person to censure, discipline, suspension, loss of license, loss of privileges, loss of membership or other penalty for participating . . . in good faith compliance with [the DWDA]."[7]

By enacting the DWDA, the people of Oregon have substituted their judgment as to what constitutes acceptable medical practice, overriding the plenary ethics and practice guidelines of the health care professions. Thus it is the Oregon government, not the Attorney General, that has improperly rendered, in the words of the Ninth Circuit's decision below, "a unilateral medical determination"[8] concerning the supposed legitimacy of a particular use of federally controlled substances.

The DWDA is nothing more than doctoring by popular referendum. The statute imposes on the medical profession a new and utterly foreign standard of care and disables the profession's capacity to discipline individual members participating in lethal prescriptions.

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[7] Or. Rev. Stat. § 127.855(2).

[8] Oregon v. Ashcroft, 368 F.3d 1118, 1127 (9th Cir. 2004) (Petitioner's Appendix at 17a).

If the DWDA's provisions are held to constitute the final obligatory interpretative sources for determining the meaning of "professional practice" and "medical purpose" as used in the CSA, despite their severe conflict with medicine's own understanding of these terms, then the CSA will be thrown on its head. Rather than abiding by Congress's concern about unnecessarily intruding upon medicine's professional judgments, a decision by this Court to uphold the lower court ruling will endorse the most far-reaching state interference with medicine's own determination of what is professionally acceptable with respect to the handling of controlled substances.

II. Determining What Constitutes Professional Medical Practice and Legitimate Purpose Best Lies, In the First Instance, With The Medical Profession, Not With Individual Practitioners Or With The State.

While individuals practice medicine, medicine itself is a profession that transcends individualism. "The last quarter century has seen wide agreement that a social contract exists between medicine and the society that it serves and that this contract is based on the concept of the profession."[9] Nonetheless, while the idea of social contract contemplates the involvement of society in finally determining what professionals may or may not do, the high measure of knowledge, commitment, and expertise that characterizes the professional project justifies a governmental presumption that favors the profession's own understanding over and against the general public's estimation at the ballot box of what constitutes legitimate professional conduct and purposes.

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[9] Sylvia R. Cruess et al., Analyses/Review of Literature: "Profession": A Working Definition for Medical Educators, 16 TEACHING & LEARNING IN MED. 74, 75 (2004) (emphasis added).

The term "profession" cannot be limited to either an entirely individualistic or an entirely state-defined meaning, as suggested by a recently proposed "working definition" of the term:

> Profession: An occupation whose core element is work based upon the mastery of a complex body of knowledge and skills. It is a vocation in which knowledge of some department of science or learning or the practice of an art founded upon it is used in the service of others. Its members are governed by codes of ethics and profess a commitment to competence, integrity and morality, altruism, and the promotion of the public good within their domain. These commitments form the basis of a social contract between a profession and society, which in return grants the profession a monopoly over the use of its knowledge base, the right to considerable autonomy in practice and the privilege of self-regulation. Professions and their members are accountable to those served and to society.[10]

The DWDA promotes the worst of both the individualistic and the state-driven extremes that ignore the substance and scope of the medical profession's opposition to medically-assisted suicide. For example, in a brief filed with this Court at the petition stage of this case, two medical practitioners who assist in their patients' suicides claim that they "are acting in their professional role" because such

[10] *Id.* (emphasis added).

conduct agrees with their own dissenting views and conforms to the DWDA's legal "standard of care."[11]

Yet the lethal role they have chosen to play does not respect the requisite "codes of ethics" of any of the particular healthcare professions, and the freedom they enjoy against professional sanction exists only because the DWDA bars the professions from exercising their "privilege of self-regulation" in this precise matter. Physicians assisting suicide may remain accountable to the state for failing to take various procedural steps, but they are no longer accountable to the medical profession with respect to the substantive ethical violations caused by their acts. In effect, their lethal conduct ceases to be "professional" since none of the healthcare professions authorizes it and none can penalize it.

Oregon voters altered the social contract governing medical providers by granting them the statutory license to violate the medical profession's ethical standards. The CSA, as construed by the Attorney General, maintains the traditional balance between public policy and professional prerogative by respecting medicine's ethical prohibition against suicide assistance. The DWDA employs the power of the state to release dissenting professionals from the dictates of their profession and its governing standards, and to restrain the profession from enforcing its standards for all its members.

Both the CSA, by not defining what constitutes "professional medical practice" or "medical purpose," and the Attorney General, by deferring to the medical profession to define these terms, recognize the intrinsic connection between the ethics of the medical profession and the ethical

[11] Respondents Brief in Opposition to Petition for Writ of Certiorari filed by Peter A. Rasmussen, M.D. and David M. Hochhalter, RPh at 18. Gonzales v. Oregon (U.S. 2005) (No. 04-623).

obligations of its members. This leaves the traditional social contract undisturbed and preserves for the medical profession its rightful place as the presumptive authority for determining medical ethics.

Your Amicus acknowledges that in other areas medical ethics may run counter to and at times should be subordinated to the public interest as traditionally understood, involving for example the preeminent duty to protect life. Your Amicus would support laws against abortion, therefore, to further the public interest even if the medical profession maintained policies favoring the practice and authorizing members' involvement.

The point here, however, is that the CSA directs federal enforcement agencies to consider whether particular uses of federally controlled substances are consistent with medical professional expectations and purposes. The language of the CSA, referring to "usual course of professional practice" and "useful and legitimate medical purpose" drives the Attorney General's deference to the medical profession.

As already noted, assisted suicide is deemed by the medical profession to be incompatible with the responsible conduct of its members, notwithstanding the dissenting views of individual members. The incompatibility between what the DWDA authorizes and what the ethics of the medical profession prohibits should inform this Court's decision if the goal is to implement the intent of Congress.

If the Attorney General is forced to construe the terms "professional practice" and "legitimate medical purpose" in the manner dictated by Oregon law, then federal enforcement officials will necessarily have to ignore the prevailing standards of the medical profession. They will have to allow federally registered physicians to assist in suicides in Oregon.

This will override professional duties as determined by the requisite professional associations and their regulatory bodies. Government directives will control medical ethics.

III. Oregon's Assisted Suicide Policy Negatively Intrudes Upon The Professional Ethics and Ethical Practice Of Nursing.

The DWDA permits only physicians to assist a suicide. However, other professionals, such as nurses and pharmacists are drawn inevitably into the picture. "Nurses and social workers are often the professionals with whom patients choose to talk regarding end-of-life decisions."[12] Thus, nurses in Oregon "are assuming roles they may not have anticipated, sometimes uncomfortably so. Ironically, Oregon's nurses are finding themselves, not physicians, on the front line of PAS [physician assisted suicide]."[13] As noted by one nurse: "Initially, when the law was designed, the assumption was that the physicians would be the first ones to explore PAS with patients, but in reality, nurses are usually the ones in the line of fire. Patients often feel nurses understand their wishes for good quality of life and good quality of death, too."[14]

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[12] The Task Force to Improve the Care of Terminally-Ill Oregonians, The Oregon Death with Dignity Act: A Guidebook for Health Care Providers, Chap. 8, "The Role of Other Health Care Providers" (2005) at http://www.ohsu.edu/ethics/guidebook/chapter8.pdf [hereinafter Guidebook for Health Care Providers].

[13] Carrie Farella, *Assisted Suicide: What Role for Nurses?*, NURSING SPECTRUM ONLINE (June 4, 2001) at http://community.nursingspectrum.com /MagazineArticles/article.cfm?AID=4123.

[14] *Id.* (quoting Pam Matthews, administrator for Evergreen Hospice, Albany, Oregon).

Standing at the "frontlines" because of their critical role in the daily care of patients, nurses in Oregon risk involvement with suicide decisions. A task force on implementing the DWDA convened by the Center for Ethics in Health Care at the Oregon Health Sciences University has pointed out: "The Act specifies that all health care providers shall have the right to choose whether to participate, but does not ensure them the right to know about the patient's request for life-ending medications. . . . If not informed, providers [including nurses] could become unknowing participants in physician-assisted suicide regardless of their personal views."[15]

The DWDA puts nurses in a bind. "The profession of nursing is built upon the Hippocratic tradition 'do no harm' and an ethic of moral opposition to killing another human being."[16] Further, "[i]ndividuals who become nurses are expected not only to adhere to the ideals and moral norms of the profession but also to embrace them as a part of what it means to be a nurse."[17] Thus, in their capacity as medical professionals governed by the ethical norm of "do no harm," nurses must abide by the

> primary commitment . . . to the health, well-being, and safety of the patient across the life span and in all settings in which health care needs are addressed. As an advocate for the patient, the nurse must be alert to and take

[15] Guidebook for Health Care Providers, Chap. 8.

[16] American Nursing Association, Ethics & Human Rights Position Statements: Assisted Suicide (1994) available online at http://nursingworld.org/readroom/ position/ ethics/prtetsuic.htm.

[17] American Nurses Association, Code of Ethics for Nurses with Interpretive Statements 5 (2001) available online at http://nursingworld.org /ethics/ecode.htm.

> appropriate action regarding any instances of incompetent, unethical, illegal, or impaired practice by any member of the health care team or the health care system or any action on the part of others that places the rights or best interests of the patient in jeopardy.[18]

Moreover, nursing's code of ethics recognizes that "[a]cquiescing [to] and accepting unsafe or inappropriate practices, even if the individual does not participate in the specific practice, is equivalent to condoning unsafe practice."[19] Finally, [p]rofessional autonomy and self regulation in the control of conditions of practice are necessary for implementing nursing standards and guidelines and assuring quality care for those whom nursing serves."[20]

The DWDA prevents nurses from exercising their professional duty to respond to the ethical violations of physicians and other medical professionals acting according to that law's provisions. The obligatory alertness demanded of the nurse to the occurrence of harmful behavior by other medical professionals is rendered nugatory. Conscientious nurses must stand by as the well-being and safety of terminally ill patients are threatened by legalized incidents of suicide assistance.

In short, the warping of universal professional norms caused by the DWDA distorts professional obligations and compromises the integrity of the nursing profession. The Oregon Nurses Association (ONA), in an attempt to accommodate the irreconcilable differences between the

[18] *Id.* at 14 (Interpretive Statement 3.5).

[19] *Id.* at 21 (Interpretive Statement 6.3).

[20] *Id.* at 23 (Interpretive Statement 7.2).

medical profession's foundational commitment to "do no harm" and the DWDA's endorsement of suicide assistance, cautions conscientiously opposed nurses against impeding patients seeking suicide assistance, or otherwise showing insufficient respect (in the eyes of Oregon law) for the patient's "self-determination."

This is evidenced in a position paper by the ONA,[21] which obliges nurses in Oregon to "share relevant information about health choices that are legal and to support the patient and family regardless of the decision the patient makes." This creates an expectation that nurses will have to teach patients about the option of killing themselves because assistance with such option is now legal.

Moreover,

> If the nurse becomes involved in a situation where he/she is unwilling to be involved in the care of a patient who has chosen assisted suicide, the nurse continues to be obliged to provide for the patient's comfort and safety, and to withdraw only when assured that alternative sources of end of life care are available to the patient. If the nurse is unable to transfer care to another provider, the nurse has the responsibility to provide for ongoing end of life care.[22]

In other words, nurses opposed to assisted suicide may be forced by emergent circumstances to accommodate

[21] Oregon Nurses Association, ONA Provides Guidance on Nurses' Dilemma (1995), available online at http://www.oregonrn.org/services-whitepapers-0001.php.

[22] *Id.*

patients under their care who want to commit suicide pursuant to the DWDA. Requesting and securing a replacement nurse from an agency (if even granted) could take too long or not be possible. Thus, nurses seeking to abide by their professional obligations not only are barred from initiating any protective measures consistent with professional norms, but may themselves be forced as a practical matter to acquiesce in ways contradicting those norms.

All this serves to undermine the uniform and fundamental value system that inspires nurses and other medical professionals across the country to enter the profession. It weakens the normative force of these values, values that otherwise guide the professional care of the terminally ill in every other state but Oregon. A decision by this Court requiring Oregon's revised interpretation of "professional" obligations to be incorporated into the CSA's reference to "professional practice" will abet the ultimate dissolution of medicine's professional integrity. The CSA, if interpreted by reference to Oregon law, will become the tool by which state interference with medical judgment will diminish the authority and capacity of medicine to sustain its foundational principles.

It all comes back to the essential difference discussed at the beginning of this brief. The Attorney General seeks to defer to a prevailing medical standard that values the lives of the terminally ill while Oregon overrides it.

Adopting Oregon's interpretation of the CSA will thwart the will of Congress, cause excessive state interference with the professional standards of medicine, put nurses and other medical professionals in an ethical bind, and expose the terminally ill to a dangerous double standard that recognizes the inalienable right to life of the healthy but not of the dying.

CONCLUSION

In light of this, your Amicus urges this Court to reverse the Ninth Circuit's decision and uphold the Attorney General's Directive barring federal registrants from prescribing federally controlled substances for the purpose of assisting suicide.

Respectfully submitted,

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